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NO. 91-26

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

AVANTI SERVICES, INC.,
Petitioner,

V.

GLENDEL DRILLING COMPANY and
PIONEER PRODUCTION CORPORATION,
Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF ON BEHALF OF AVANTI SERVICES, INC., PETITIONER, IN SUPPORT OF PETITION

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I.

CONTRACTUAL LIABILITY SHIFTING

A. NEW ARGUMENT

At page 7 of its opposition brief, Glendel cites *De Shaney v. Winnebago County Dept. of Social Services,* 489 U.S. 189, 109 S.Ct. 998, at p. 1003 n.2 (1989), in support of its suggestion that this Court should decline to consider Avanti's argument that contractual liability shifting has no place in the comparative fault principles of maritime law. This Court should decline, says Glendel, because Avanti raised this argument for the first time in its petition to this Court. In *De Shaney,* however, the petitioner's argument was made "for the first time in petitioner's brief to this Court: it was not ... raised in the petition for certiorari." (Id.)

Moreover, Avanti is suggesting a change in the law as established by this Court, which only this Court can do. The lower courts could not effect such a change without overruling decisions of this Court which, of course, they were powerless to do. Therefore, to have raised this issue prior to Avanti's petition to this Court would have been a vain and useless exercise.[1]

B. SAFETY REASONS

At page 10 of its brief, Glendel again argues that an

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[1] In its suggestion for *en banc* rehearing, Avanti suggested that contractual indemnity shifting be outlawed by an alternate means: adepting state anti-indemnity statutes as "substitute" maritime law. This the *en banc* court could have done by *following* a decision of this Court in *Kossick v. United Fruit Co.,* 365 U.S. 731, 81 S.Ct. 886, 6 L.Ed.2d 56 (1961), *reh'g denied,* 81 S.Ct. 1657.

issue was not argued below, so it would be difficult for this Court to make the factual conclusions that the state anti-indemnity statutes are safety-related. Apparently, Glendel would have this Court believe that Avanti thought up the safety connection. But the conclusion which Glendel argues would be difficult for this Court to make, as well as the safety connection which Glendel argues does not exist, were both established in a decision which Avanti cited in footnote 1 at page 7 of its petition herein. In *Bryant v. Platform Well Service, Inc.,* 563 F.Supp. 760 (E.D. La. 1983), the court found as follows:

> The mineral industry is one of the most important industries in this state. Additionally, it is well known that the exploration for oil and gas is an extremely hazardous undertaking. It is the size of the minerals industry and the vast number who work in it which motivated the legislature to move to limit indemnity agreements.
>
> LSA-R.S. 9:2780 on its face prevents one company (indemnitee) from requiring another company (indemnitor) to idemnify it for its own negligence or fault. If the indemnitee can by contract insulate itself from exposure for injuries to workers, where it creates the hazard causing the injury, there is less motivation to follow the safest work practices. If the indemnitee is prevented from contracting away the responsibility, then it will be more likely to take the extra needed steps to avoid injury to workers. This statute, is a rational way to protect Louisiana workers and the oil industry in general from less than optimum safety measures. (p. 763).

Thus, having incorrectly assumed that there is no public policy impetus behind the outlawing of contractual liability shifting, Glendel quotes at page 8 of its brief from

Spinks v. Chevron Oil Co., 507 F.2d 216 (5th Cir. 1975), to the effect that "no public policy prohibits" contractual liability shifting.[2]

Having incorrectly assumed that the mineral industry in Louisiana is not affected with the public interest, Glendel quotes at page 9 of its brief from *Giacona v. Marubeni Oceano (Panama) Corp.*, 623 F.Supp. 1560 (S.D. Tex. 1985), to the effect that, where there is no "industry affected with the public interest", public policy actually dictates the upholding of contractual liability shifting because it is economically efficient. But, as found in *Bryant*, supra, in the offshore mineral industry public policy dictates that economic efficiency comes at too great a cost in unsafe work practices.

C. INDEMNITY PROMOTES SAFETY?

Glendel's argument, at page 11 of its opposition brief, is particularly irksome. It describes as "totally untrue" Avanti's argument that contractual liability shifting reduces the motive for safety. (But please see *Bryant*, supra, in which the court found just that.) It then states that indemnifying a party for its own fault somehow *promotes* safety because it places the safety incentive on the employer who can fire an employee who violates safety rules. But a look at the facts of this case exposes the fallacy of Glendel's argument. Here, a family man lost his life because some Glendel employee who was in charge of Glendel's barge did not fix a bent door on the perimeter of

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[2]*Spinks* applied maritime law. There was no consideration of whether state law even might apply. Spinks' employer, Labor Services, contracted only to provide labor, not a vessel (507 F.2d at 220). Under the later decision in *Thurmond v. Delta Well Surveyors*, 836 F.2d 952 (5th Cir. 1988), Louisiana law (and its public policy) would have applied to, and voided, the indemnity provisions in that contract.

the barge, even though Glendel was aware of the hazard thus created. Avanti could not repair Glendel's barge or fire Glendel's barge foreman if he did not see to it that the hazard was eliminated. Only Glendel could eliminate the hazard. Under comparative fault principles, Glendel would have been responsible for its dereliction and thus would have incentive to see to it that the hazard was eliminated. However, simply because of contractual liability shifting, Glendel seeks to wash its hands of responsibility and walk away.

II. STATE COURT CONFLICT

At pages 16-17 of its opposition brief, Glendel recharacterizes Avanti's argument so as to apply to the ruling in *Stoot v. Fluor Drilling Services, Inc.*, 851 F.2d 1514 (5th Cir. 1988), that "nothing in maritime law precludes the parties to a maritime contract from freely choosing Louisiana law." (Glendel brief, p. 16). But that is not the ruling with which the Louisiana Supreme Court decision conflicts.

At page 8 of its petition, Avanti cited the ruling in *Stoot* that "Louisiana's Anti-Indemnity statute does not conflict with any *purpose* of maritime law ..." Then, at pages 8-9, Avanti quoted the holding in *Rodrigue v. Legros*, 563 So.2d 248 (La. 1990), *reh'g denied*, 563 So.2d 257, that "application of the Louisiana [Oilfield Anti-Indemnity] statute would interfere with the uniform features of maritime law ..." It certainly appears to Avanti that there is a conflict here.

The more significant conflict, however, is between the holding in *Rodrigue* and that in *Sohyde v. Coastal States Gas Producing Co.*, 644 F.2d 1132 (5th Cir. 1981), which (as Glendel points out and as discussed in the next section of this brief) dealt with maritime tort jurisdiction,

and held that an accident involving a barge in inland Louisiana waters was

> "not of such a character that leaving the parties to pursue state law remedies would disturb the federal interest of maintaining the uniformity of maritime law." (p. 1138).

This holding in *Sohyde* was in contemplation of "the traditional concept of the role of admiralty" (Id.) the purpose of which, as held in *Stoot,* does not conflict with the Louisiana statute. Taken together, then, the rulings in *Stoot* and *Sohyde* referred to by Avanti (not the ruling referred to by Glendel in its recharacterization) certainly seem to conflict with *Rodrigue.*

Perhaps more significant to this Court's considerations is the conflict in *any* decision by *any* court with one of the two lines of cases referred to by the panel herein as "apparently contradictory" (Pet. App. 21). In other words, whichever way any court, state or federal, rules on this issue, it is going to conflict with one or the other of those lines of cases. Indeed, in *Rodrigue* the Louisiana Supreme Court recognized both this conflict ("but see *Lewis v. Glendel Drilling Co.*", which the court characterized as "applying the rule but questioning its persuasiveness"-563 So.2d at 251) and the lack of guidance by this Court (563 So.2d at 253).

III.

MARITIME CONTRACT CRITERIA

Beginning at page 17 of its opposition brief, Glendel argues that its contract meets the criteria for a maritime contract. But Glendel misses the point. Avanti questions the validity of the criteria, not whether Glendel's contract meets those criteria.

At page 21, Glendel accuses Avanti of raising the "vessel" status issue which was not raised below and argues that the facts were not developed in order to allow the courts below to determine whether Glendel's barge met the criteria to be a "vessel". But that issue was raised in the panel decision itself, not as to whether Glendel's barge factually met the criteria, but as to the validity of "vessel" status as a criterion to determine the nature of the contract (Pet. App. 8a).

At page 13, Glendel refers to Judge Brown's footnote in *Dominque v. ODECO,* 923 F.2d 393, 397 n.9 (5th Cir. 1991), placed there "in hopes" that researchers would be able to use it to distinguish between tort and contract cases (a distinction which the various panels of the Fifth Circuit have not made). The fact that the judge felt the need to do that speaks more eloquently than Avanti ever could to the morass of ill-founded and conflicting decisions which Avanti is asking this Court to address.

The panel herein felt constrained (Pet. App. 6a) to follow *Theriot v. Bay Drilling Corp.,* 783 F.2d 527 (5th Cir. 1986), and the criteria used therein to determine whether a contract is maritime.

Theriot relied on *Corbitt v. Diamond M. Drilling Co.,* 654 F.2d 329 (5th Cir. 1981), in which Sladco contracted with Shell to provide a casing crew (a wireline service) to work on the barge furnished by Diamond M. to Shell. Corbitt, a *Sladco* employee, was injured while performing wireline services. The court ruled that maritime law applied to the Shell/Sladco contract because three prior decisions "established beyond cavil" that it was a maritime contract.[3] The decisions it cited (654 F.2d at 332) are (1)

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[3] It should be noted here that *Domingue v. ODECO,* supra, is in direct conflict with *Corbitt.* In *Domingue,* as in *Corbitt,* Dimensional

Transcontinental Gas Pipeline Corp. v. Mobile Drilling Barge, 424 F.2d 684 (5th Cir. 1970), (2) *Halliburton v. Norton Drilling Co.,* 302 F.2d 431 (5th Cir. 1962), and (3) *Tri-State Oil Tools Indus. v. Delta Marine Drilling Co.,* 410 F.2d 178 (5th Cir. 1969).

(1) *Transcontinental* simply noted, without discussion of whether the contract therein was maritime, that "the construction of a maritime contract is governed by federal, not state law." (424 F.2d at 691). It cited two decisions, neither of which considered a contract.[4]

(2) *Halliburton* did not involve a contract. It held only that maritime law applied to *tort* indemnity sought on the alternate theories of active-passive negligence and quasi-contractual implied warranty of workmanlike performance because the plaintiff's tort action was brought under maritime law.

(3) *Tri State* was recognized in *Corbitt* itself to have held only that "federal maritime law of tort indemnity controls where accident occurs in navigable waters". (654 F.2d at 332).

The point is this: the present criteria for determining whether a contract is "maritime" have been developed

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Footnote 3 continued.

substitute Sladco) contracted with ODECO (substitute Shell) to do wireline work on ODECO's (Substitute Diamond M.) jack-up drilling rig. Domingue, a Dimensional employee, was injured while performing wireline services (as was Corbitt). The *Domingue* court, however, held that the contract was non-maritime and reversed the trial court's application of maritime law (923 F.2d at 398).

[4] *A/S J. Ludwig Mowinckels Rederi v. Commer. Steve. Co.,* 256 F.2d 227 (2nd Cir. 1958), *cert. dismissed,* 358 U.S. 801, 79 S.Ct. 9, 3 L.Ed. 2d 49; and *Halliburton,* supra.

from *tort jurisdiction* decisions. The panel decision herein questioned both the "persuasiveness" of the decisions involved in that development (Pet. App. 9a) and the "uncertain policy underpinning [the] result" (Pet. App. 2a).

Avanti is simply asking this Court to review the criteria (if they are not mooted by this Court's outlawing of contractual liability-shifting altogether). As Avanti asked at page 14 of its petition,

> "should not the nature of a contract be determined by the type of service(s) to be provided and the purpose of the vessel as contemplated in the contract [rather than by tort jurisdiction criteria]?"

CONCLUSION

Louisiana law and maritime law share a common interest in the safety of those whom the law is designed to protect. Louisiana has taken the appropriate step of eliminating contractual liability shifting in order to promote safety. But, unless this Court acts, maritime law will continue to subject oilfield workers to unnecessary hazards which should have been cured if the proper incentive had not been contracted away. And whether or not that incentive is present or is contracted away will continue to be determined by the fortuitous chance of whether a worker's employer contracted in such a way as to meet or not meet wholly inappropriate criteria.

Despite Glendel's unfounded opposition, there remains no reason why this Court should not consider this matter and every reason why it should. The safety of workers in the maritime environment depends on it. So does the uniformity of maritime law, which at present

treats liability shifting in tort differently than it does in contract, although such shifting accomplishes the same undesirable end in both contexts.

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